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The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship

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THE THIRTY-NINTH ANNUAL EDWARD G. DONLEY MEMORIAL LECTURES: THE ART OF CENSORSHIP

*Amy Adler**

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Why has “art” been the subject of so many recent censorship attacks? The attacks on art point to an unsolved problem in First Amendment theory: how do we justify protection for art under a vision of the First Amendment that values only rational ideas and straightforward political argument? How does art—nondiscursive, non-verbal, often irrational, expression—fit into this picture?

In this piece, I argue that contemporary First Amendment battles over art must be understood in light of the history of iconoclasm and the anxiety that surrounds visual, as opposed to verbal, representation. By reframing the debate in this way, I show that scholars have overlooked an important, albeit improbable, source for justifying the protection of art as speech.

I address these issues by asking first, why do we—in fact, do we?—protect art under the First Amendment? And second, why have we displayed such an impulse to censor and attack art? I argue that the answer to both questions ought to be the same: The very things about art that make us uncomfortable and that fuel our impulse to censor it—its force beyond words, its power and its irrationality—should make it fully protected speech under the First Amendment. But to reach this conclusion, we must rethink the marketplace of ideas model that lies at the foundation of First Amendment law.

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I. CENSORING ART

If we review the so-called "culture wars"¹ of the 1990's, it is clear that art has been on the front lines of the most prominent censorship battles.² The culture wars began in 1989 with two highly publicized attacks on artists: Robert Mapplethorpe,³ known for his elegantly homoerotic nudes, and Andres Serrano, whose claim to fame was a photograph of a crucifix submerged in the artist's own urine.⁴ Since then, controversies over art have erupted with predictable regularity. Government funding for the arts has captured much of our attention. Recently, the

¹ See generally CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS (Richard Bolton ed., 1992); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

² For a discussion of contemporary art and its vulnerability to government censorship, see Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990); Amy Adler, *Why Art Is On Trial*, 22 J. ARTS MGMT. L. & SOC'Y 322 (1993). For various opinions on the politics of the art wars, see ALICE GOLDFARB MARQUIS, ART LESSONS: LEARNING FROM THE RISE AND FALL OF PUBLIC ARTS FUNDING (1995); Martha Bayles, Editorial, *The Philistine Consensus*, N.Y. TIMES, Jan. 30, 1995, at A19 (describing battle over leftist politics); Lynne A. Munson, Editorial, *Art By Committee*, N.Y. TIMES, Sept. 21, 1995, at A23 (criticizing trend of funding art that expresses leftist identity politics); 1-3 PEOPLE FOR THE AMERICAN WAY, ARTISTIC FREEDOM UNDER ATTACK (1992-95) (documenting increasing attacks on artistic speech).

While examples of recent art controversies beyond those involving the NEA are too numerous to catalogue here, several authors have analyzed and documented the growing incidence of attacks on artistic expression. See, e.g., STEVEN C. DUBIN, ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS (1992) (analyzing new climate of anger against art); MARJORIE HEINS, SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS (1993) (describing numerous cases of attacks on art).

³ See ROBERT MAPPLETHORPE: THE PERFECT MOMENT (1989) (catalogue from exhibition at the Institute of Contemporary Art). Mapplethorpe achieved national notoriety shortly after his death from AIDS when a partially government-funded exhibition of his classical black and white photographs, some of them picturing men in homoerotic and sadomasochistic positions, became the target of a congressional attack on the NEA. See, e.g., Ingrid Sischy, *Photography: White and Black*, NEW YORKER, Nov. 13, 1989, at 124, 138-39. ("the spectre of death" hangs over the pictures; "the information that Mapplethorpe died of AIDS is . . . always available.") Members of Congress continually spoke of Mapplethorpe's disease. Senator Helms, for example, calling Mapplethorpe's work "homosexual pornography," said Mapplethorpe "died of AIDS while spending the last years of his life promoting homosexuality." 135 CONG. REC. S12111 (daily ed. Sept. 28, 1989) (statement of Sen. Helms). See also *id.* at H3640-41 (daily ed. July 12, 1989) (statement of Rep. Dannemeyer) (noting Mapplethorpe's death from AIDS, and calling him a "homosexual activist[]"). See also Hilton Kramer, *Is Art Above the Laws of Decency?*, N.Y. TIMES, July 2, 1989, 2, at 1 (denouncing Mapplethorpe's work from an artistic, rather than political, perspective).

⁴ Serrano is the Hispanic/black artist who achieved notoriety when Senator Jesse Helms singled out a Serrano photograph entitled *Piss Christ* in a show partially sponsored by the National Endowment for the Arts ("NEA"). See C. Carr, *Going to Extremes*, VILLAGE VOICE, Nov. 20, 1990, at 67. See Ken Johnson, *Andres Serrano at Stux (Review of Exhibition)*, ART AM., Mar. 1991. Serrano became one of the plaintiffs in the *Finley* case, decided by the Supreme Court in 1998. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

Beginning in 1989, after controversy erupted over grants made by the NEA that helped to support exhibitions of the work of artists Robert Mapplethorpe and Andres Serrano, Congress amended the statutory rules that govern the awarding of NEA grants to deny funding to "obscene" art. Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1989). The new law was declared unconstitutionally vague. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-82 (C.D. Cal. 1991). In 1990, Congress added the so-called "decency rule" to the statute governing NEA grants. 20 U.S.C. 954(d) (1994). This rule was upheld by the Supreme Court against a challenge claiming that the law was impermissible viewpoint discrimination and unconstitutionally vague. See *Finley*, 524 U.S. at 588.

Supreme Court entered the debate, issuing a ruling about the National Endowment for the Arts' ("NEA") denial of grants to controversial performance artist Karen Finley.⁵ In 1999, the "Sensation" exhibit at the Brooklyn Museum of Art, complete with a dung-splattered portrait of the Virgin Mary, made front-page news when an angry Mayor tried to revoke the Museum's lease.⁶ The political fights over national funding for the arts now recur every year like a bad dream, featuring the same cast of characters and a new, scandalous artist who is dug up to horrify and shock the nation: artists such as photographers Merry Alpern and Barbara de Genevieve,⁷ filmmaker Marlon Riggs,⁸ or Ron Athey, the HIV-positive artist famed for his performance piece in which he cut incisions into the back of another man, wiped the wounds with paper towels, and draped the bloody towels over a stunned audience in Minneapolis.⁹

In addition to these funding disputes, artists increasingly have been subject to criminal prosecution and arrest. In the history of this country, there had never been a prosecution brought against an art museum until 1989, when Cincinnati brought obscenity charges against a museum there for displaying Mapplethorpe's photographs.¹⁰ Since then, there have been several prominent criminal cases brought against artists: in both Alabama and Tennessee, prosecutors brought obscenity and child pornography charges against Barnes & Noble for selling photography books by artists Jock Sturges and David Hamilton.¹¹ (Sturges' studio had been ransacked by an FBI raid in 1993, but a grand jury had refused to indict

⁵ See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

⁶ See *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (granting museum's motion for preliminary injunction against the city); "Sensation" on Trial: *Andrew Ross Talks With Amy Adler*, ARTFORUM, Nov. 1999, at 43 (interview); Dan Barry & Carol Vogel, *Giuliani Vows to Cut Subsidy Over 'Sick' Art*, N.Y. TIMES, Sept. 23, 1999, at A1. The city eventually settled with the museum and restored all funding. See Alan Feuer, *Giuliani Dropping His Bitter Battle With Art Museum*, N.Y. TIMES, March 28, 2000, at A1.

⁷ The disputes over Alpern and De Genevieve erupted when the NEA Advisory Council decided, in an extraordinary last-minute measure, to reject the women's grants, which had already been approved through the customary NEA peer panel process. Both of the rejected artists explicitly employ sexual images to make what they argue is feminist art. Merry Alpern's rejected work consists of a series of photographs of prostitutes that she took using a zoom camera to spy through the window of a brothel. See Jacqueline Trescott, *Inside Left Jabs*, WASH. POST, Aug. 14, 1994, at G4; Richard B. Woodward, *An NEA Closet Case: Photographer Merry Alpern Peeps at a Wall Street Sex Club*, VILLAGE VOICE, Dec. 13, 1994, at 37; Charles Storch, *On Art's Edge: Barbara deGenevieve at Odds With the NEA*, CHI. TRIB., Aug. 18, 1994, § 5, at 7.

⁸ See Marlon T. Riggs, *Meet the New Willie Horton*, N.Y. TIMES, Mar. 6, 1992, at A33 (describing controversy over his PBS film about black gay men). See Marc Gunther, *"Tongues" Could Touch Off New Protests*, *Orlando Sentinel*, July 19, 1991, at E6 (noting that Riggs' film could trigger "another big battle over art, government money and censorship").

⁹ See Edward Guthmann, *Skin-Deep Look at an Artist of Pain*, S.F. CHRON., Feb. 10, 1999, at E2 ("Athey, who is gay, HIV-positive and a former heroin junkie, cut a design in another man's back, blotted the blood with paper towels and hung the towels on a clothesline above the audience.").

¹⁰ See *supra* note 3.

¹¹ See J.R. Moehringer, *A Pair of Books, a Bitter Debate: Is it Art or Indecency?*, L.A. TIMES, Mar. 9, 1998, at 3A.

him.)¹² Oklahoma brought a child pornography prosecution against a video store for renting the Academy Award-winning film *The Tin Drum* based on a novel by Gunter Grass.¹³ Cincinnati police arrested bookstore employees for renting a film by acclaimed Italian director Pier Paolo Pasolini.¹⁴ Hollywood studios reportedly shunned the remake of the film *Lolita* because of fears of criminal prosecution; despite the filmmakers' careful use of body doubles for all controversial scenes, it took a year, as well as significant cutting, to find a studio willing to release the film.¹⁵ Police have routinely stormed shows by performance artist Karen Finley.¹⁶ Photographer Spencer Tunick, known for his work depicting large numbers of nude people in public places, has been arrested five times.¹⁷

The recent political and legal attacks portray art in two strangely contradictory ways. On the one hand, critics denounce art for its pointlessness, its self-indulgent, even decadent irrelevance. In an attack on the NEA, Newt Gingrich described art as a "sandbox for the rich," "a plaything of pork ... for an elite group."¹⁸ On the other hand, as these frequent controversies attest, there is something about art that belies this portrait. Art seems particularly relevant and threatening, certainly to its critics. Their attacks, and the resultant publicity that they have received, give testament to another vision of art: as a powerful and dangerous force that calls some to battle. These two contradictory views, evident in political debate, also permeate our First Amendment jurisprudence of art.

II. WHY IT IS DIFFICULT TO JUSTIFY THE PROTECTION OF ARTISTIC EXPRESSION UNDER THE FIRST AMENDMENT

What is the status of art as "speech" under the First Amendment? The answer is uncertain.¹⁹ The Supreme Court seems to *assume*²⁰ that art is protected

¹² See Philip Hager, *U.S. Grand Jury Refuses to Indict Photographer*, L.A. TIMES, Sept. 17, 1991, at A3.

¹³ See Lois Romano, *Seizure of 1979 Art Film Draws Fire*, WASH. POST, June 30, 1997, at A1. A federal judge ruled that the film did not violate Oklahoma's statute. See *Oklahoma v. Blockbuster Videos, Inc.*, 27 Media L. Rep. 1248 (D. Ok. 1998); *Video Software Dealers Ass'n Inc. v. City of Oklahoma City*, 6 F. Supp. 2d 1292 (D. Ok. 1997) (ordering that confiscated videotapes be returned).

¹⁴ See William A. Weathers, *Three Bookstore Workers Cited in Obscenity Case*, THE CINCINNATI ENQUIRER, Jul. 1, 1994 at B1.

¹⁵ See Celestine Bohlen, *A New 'Lolita' Stalls in Europe*, N.Y. TIMES, Sept. 23, 1997, at E1.

¹⁶ See Carr, *Unspeakable Practices, Unnatural Acts: The Taboo Art of Karen Finley*, VILLAGE VOICE, June 24, 1986, at 17.

¹⁷ See *Artist Carries Out Mass Nude Photo Shoot in Public*, CHI. TRIB., June 5, 2000, at 8.

¹⁸ Christine Dolen, *Arts Under Fire*, YORK DAILY RECORD, March 19, 1995, at 7, available in 1995 WL 4896376.

¹⁹ See generally Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996) (discussing status of art in First Amendment). Compare Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262 (arguing that literature and the arts merit protection because they inform the political process by imparting sensitivity to human values) with Robert H. Bork, *Neutral Principles and Some First*

speech, but why? Art's First Amendment value is hard to reconcile with the underlying rationale for protecting speech under the First Amendment: the marketplace of ideas. Free speech theorists have long reasoned that broad protection for speech will result in a competitive marketplace for truth, and furthermore, that truth will triumph in a free market. As John Milton explained, for truth to emerge, we need a system in which truth and falsehood freely grapple.²¹

The marketplace of ideas model makes several assumptions. It tends to value speech that can be classified as "ideas," that is rational rather than emotional, that conveys a "particularized message,"²² that is discursive and direct.²³ Often this metaphor of the marketplace is articulated in instrumental political terms: the marketplace of ideas is essential not just because we value truth in general, but because we value *political* truth.²⁴ As the Court said in *Roth v. United States*,²⁵ its first obscenity case: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of *political* and social changes desired by the people."²⁶ The marketplace model thus assigns to speech a central role in our democracy.

Yet once we value speech for its rationally comprehensible ideas, as the marketplace model does, then it becomes hard to accommodate protection for art. It would be a reductive and cramped reading of art itself to suggest that the point of

Amendment Problems, 47 IND. L.J. 1, 20-29 (1971) (finding "no [principled] basis" for protecting artistic expression under the First Amendment because art lacks political significance). Compare *Bery v. City of New York*, 906 F. Supp. 163, 169 (S.D.N.Y. 1996) (upholding regulation on selling art by finding that "art does not carry either words of the particularized social and political messages upon which the First Amendment places special value") with *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (reversing district court decision and finding that art is protected by First Amendment).

²⁰ See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (protecting works of "serious artistic value"). But cf. *Young v. American Mini-Theaters*, 427 U.S. 50, 70 (1976):

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.

²¹ See JOHN MILTON, *AREOPAGITICA* 35 (Payson & Clarke, Ltd. 1927) (1644) ("Let [truth] and Falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter."). Milton's work influenced John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* 60-61 (Prometheus Books ed. 1986). The Supreme Court relied on Mill's theory in *New York Times Co. v. Sullivan*, the landmark libel case. 376 U.S. 254, 279 n.19 (1964) (quoting Mill).

²² *Spence v. Washington*, 418 U.S. 405, 409 (1974) (stating that First Amendment scrutiny is triggered whenever "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was greater that the message would be understood by those who viewed it.") (citations omitted). But see *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557, 569 (1995) (questioning Spence's "particularized message" language).

²³ See, e.g., Hamilton, *supra* note 19.

²⁴ For one case articulating the assumption that political speech is the core of the First Amendment, see, e.g., *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

²⁵ 354 U.S. 476 (1957).

²⁶ *Id.* at 484 (emphasis added).

an abstract painting is to express an idea, let alone a political idea.²⁷

One reason that art is particularly hard to fit within the marketplace model stems from art's visual rather than verbal form. Of course, there is some art that is textual. And of course, there are many visual images that are not art. But for purposes of this argument, I will focus on art as a subset of all visual speech.

Therefore, the problem for art may be viewed as part of a larger problem: I believe that the First Amendment offers greater protection to speech that is verbal rather than visual.²⁸ The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and rarely explained. I know of no scholarship that addresses it directly. Yet the difference between text and image within the First Amendment has significant real world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material.²⁹ The Attorney General's Commission on Pornography noted and encouraged this trend in 1986, pointing to the Supreme Court's acknowledgement of the "special prominence of the printed word," as compared to images, in free speech law.³⁰ There is "for all practical purposes, no prosecution of [purely textual] materials now."³¹ The preference for text also arises in child pornography law, which focuses exclusively on pictures.³² And it turns up as an assumption in a variety of scholarly thinking. For example, Catharine MacKinnon's anti-pornography writing argues that pictorial pornography, especially photography, is far more harmful to women than is textual pornography.³³ All of these approaches evidence an assumption that text should merit more protection than images under the First Amendment.

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This may explain the Court's struggle with the First Amendment status of cinema. Initially, in 1915, the Court concluded that motion pictures were not "organs of public opinion" but only "mere representations of events, of ideas and sentiments...." *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230, 243-44 (1915). Later, the Court changed its mind, according First Amendment protection to cinema in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). But even in this decision, the Court revealed a very cramped vision of the value of cinema, stating that "motion pictures are a significant medium for the communication of ideas." *Id.* at 501. Although this is undoubtedly true, the statement does not begin to capture the multiple reasons society values cinema.

28

For a discussion of the different impact of text and images, see Rudolf Arnheim, *The Images of Pictures and Words*, 2 WORD & IMAGE 306 (Oct.-Dec. 1986).

29

See *Kaplan v. California*, 413 U.S. 115, 119 (1973) ("A book [as opposed to pictures] seems to have a different and preferred place in our hierarchy of values, and so it should be.").

30

ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 382 (1986).

31

Id.

32

See *New York v. Ferber*, 458 U.S. 747, 764 (1982) ("We note that the distribution of descriptions or other depictions of sexual conduct [by children], not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.").

33

See generally CATHARINE A. MACKINNON, ONLY WORDS (1993); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST THEORY]; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

III. THE DANGER OF ART

Thus, it is hard to articulate why art is valuable under a marketplace of ideas model of the First Amendment—why it even invokes First Amendment protection to begin with. But the problem is more complicated. There is also something about art, and about visual images in general, that makes people perceive them as dangerous.

Let's return to Catharine MacKinnon, the leading scholar of the feminist anti-pornography movement, mentioned above. MacKinnon argues that we should ban pornography not because it is immoral or offensive or worthless—reasoning that comes from obscenity law³⁴—but because it constructs a world of violence, subjugation and inequality for women.³⁵ Given the harms MacKinnon attributes to pornography, it is unsurprising that she would make no exception for artistic value. MacKinnon rejects the traditional test for obscenity set out in *Miller v. California*,³⁶ which protects a work that may otherwise be labeled obscene if it demonstrates "serious literary, artistic, political, or scientific value."³⁷ She writes: "[C]ommercial sex resembles art because both exploit women's sexuality."³⁸ In contrast to obscenity law, MacKinnon insists that art should not merit any special status or exception in her pornography analysis.³⁹

³⁴ In a tortured series of opinions since the 1957 case of *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court has defined "obscenity" as a constitutional term of art. In contrast, the Court has never defined "pornography." It has, however, defined the term "child pornography" as a distinct category of speech. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990).

³⁵ *See, e.g., ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 36, 46 (1988) ("[P]ornography institutionalizes a subhuman victimized second class status for women.").

³⁶ 413 U.S. 15 (1973).

³⁷ *Id.* at 24. As I have shown before, even that standard, which purports to protect artistic expression, offers less than sufficient protection due to the nature of contemporary art and to the cramped nature of the Court's analysis. Adler, *Post-Modern Art and the Death of Obscenity Law*, *supra* note 2.

³⁸ MACKINNON, *FEMINIST THEORY*, *supra* note 33.

³⁹ MacKinnon and Dworkin's most detailed definition of pornography arises in the form of their model civil rights ordinance. This ordinance defines pornography as:

The graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts - including but not limited to vaginas, breasts, or buttocks - are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

DWORKIN & MACKINNON, *supra* note 35.

Operating only through civil remedies, the model ordinance provides five possible causes of action to individuals claiming to have been harmed by pornography. Slightly modified versions of this

But MacKinnon does not ignore artistic value altogether. If anything, artistic status could make speech more, rather than less, harmful for MacKinnon. In a curious passage she writes,

[I]f a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work's value among men enhances its injury to women. Existing standards of literature, art, science, and politics, are, in feminist light, remarkably consonant with pornography's mode, meaning and message.⁴⁰

Note what's going on here. First, MacKinnon suggests that value is irrelevant. After all, according to her, this is speech that causes rape and subjugation. Why should we care about art museums? But MacKinnon goes further. Artistic value is not completely extraneous to our inquiry. In fact, artistic value makes pornography *worse*. Thus she writes that if a work is pornographic but has artistic value, it becomes even more harmful; as she puts it, value "*enhances*" the injury to women.⁴¹ This view stands the *Miller* reasoning on its head.

This theme about the danger of artistic images has a long history in western civilization. In Exodus, Chapter twenty, Verse four, the Hebrew Bible commands:

Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth⁴²

Recall that the Second Commandment was handed down from Moses to the people on tablets in the midst of the "Golden Calf" episode of the Bible.⁴³ Moses went to receive the Word of God and, in his absence, the Israelites became distracted.⁴⁴ They built the Golden Calf, a glittery golden image, and began dancing around it as

ordinance were passed by the City Councils of Minneapolis and Indianapolis in the 1980s, but neither is currently in effect. The Mayor of Minneapolis refused to sign his city's bill. See *The Minneapolis Civil Rights Ordinance, With Proposed Feminist Pornography Amendments*, 2 CONST. COMMENTARY 181, 183-84 (1985) (reprinting proposed amendments to Minneapolis Code of Ordinances, tit. 7, chs. 139 & 141). The Indianapolis City Council passed a modified version of this definition into law, eliminating subsections (i), (v), (vi), and (vii), and substituting instead as (vi) "women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." Indianapolis, Ind., Code 16-3(q) (1984). However, the Seventh Circuit Court of Appeals struck down the Indianapolis ordinance on constitutional grounds, terming it "thought control." *American Booksellers Ass'n v. Hudnut*, 771 F. 2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

⁴⁰ MACKINNON, *FEMINIST THEORY*, *supra* note 33, at 202; see also DWORKIN and MACKINNON *supra* note 35 at 199 ("Sex in life is no less mediated than it is in art. . . . It is not that life and art imitate each other; in sexuality, they are each other."); *id.* at 203 ("Commercial sex resembles art because both exploit women's sexuality").

⁴¹ MACKINNON, *FEMINIST THEORY*, *supra* note 33, at 202.

⁴² Exod. 20:4-5.

⁴³ See *id.* at 32:1-35.

⁴⁴ See *id.* at 32:1.

they lapsed into decadent sensuality and distraction.⁴⁵ When Moses returned with the inscribed Word of God, he broke the tablets in anger at what he beheld.⁴⁶ This idolatry was no small matter. Moses killed 3,000 men.⁴⁷ He burnt the Golden Calf, strewing its dust into the water, and made the people drink it.⁴⁸ Only then did Moses give God's commandments once again to the Israelites.⁴⁹ This passage marks the elevation of the Word over the image in the Bible. It vividly illustrates the hazardous sensuality of visual representation.

The story of the Golden Calf represents a pervasive theme in the religious literature: images are dangerous because of their irrational power, their appeal to passion rather than reason. The seductive quality of artistic images, their appeal to the senses and the emotions, has been a recurring justification in the complex and centuries-old history of iconoclasm, censorship, and suppression of art. The voluptuousness of art, its power beyond words, the possibility that it could be worshipped, fetishized, or misinterpreted, paved the way for both adulation and censorship. This view, of course, helps to explain why First Amendment law would devalue images: by bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.

This historical fear of images that motivated iconoclasm is still present in our culture and, I believe, in our First Amendment law.⁵⁰ This history illuminates not only why art and images are vulnerable under free speech law, but it also suggests a way to reevaluate art's position. The tremendous power of visual images shows us that the very thing that often provokes censorship of art is the very thing that ought to *invoke* First Amendment protection for it.

IV. CAPTURE THE FLAG: THE VALUE OF VISUAL IMAGES

I'd like to turn to an improbable but appropriate source for thinking about the status of art under the First Amendment: *West Virginia Board of Education v. Barnette*.⁵¹ *Barnette* was a flag case about Jehovah's Witnesses who didn't want to salute the flag in school.⁵² What does it have to do with art? I want to make a case that

⁴⁵ See *id.* at 32:19.

⁴⁶ See *id.*

⁴⁷ See Exod. 32:28.

⁴⁸ See *id.* at 32:20.

⁴⁹ See *id.* at 34:1-9.

⁵⁰ For an example of the persistence of this fear in early American culture, see, e.g., NATHANIEL HAWTHORNE, *THE PROPHETIC PICTURES* (1882) ("Some deemed [painting] an offence against the Mosaic Law, and even a presumptuous mockery of the Creator . . . Others, frightened at the art . . . were inclined to consider the painter as a magician."). For a discussion of the roots of this American attitude in English culture, see, e.g., JOHN PHILLIPS, *THE REFORMATION OF IMAGES*, (1973) at xii (noting that images were viewed as "perilous in themselves, full of the destructive power of their always-suspect origins").

⁵¹ 319 U.S. 624 (1943).

⁵² See *id.* at 629.

it does. Bear with me as I offer an unconventional reading of the case.

Barnette struck down a regulation that required children in public schools to salute the flag.⁵³ The plaintiffs were parents who brought suit to restrain enforcement of this regulation against their children who were Jehovah's Witnesses.⁵⁴ Why didn't the Jehovah's Witnesses want to salute the flag? Fittingly for this discussion, their religious beliefs led them to consider the flag a graven image within the prohibition of the Ten Commandments.⁵⁵ Saluting the flag was idolatry, as wrong as fetishizing the Golden Calf. Indeed, the Supreme Court in *Barnette* quoted the Ten Commandments' prohibition on graven images to explain why the Jehovah's Witnesses wouldn't salute the flag.⁵⁶

The issue in *Barnette* was the expressive meaning of saluting the flag, which the Court considered a "form of utterance."⁵⁷ Nonetheless, the Court lingered at some length over the meaning of the flag itself as speech. It is here that I think the Court gives us a glimpse of its thinking about the strange power of visual speech. The flag's message is, after all, conveyed solely through its visual image. It is a wordless pattern of stars, stripes and colors.

In a curious passage, the Court talks about the nature of visual symbols. Justice Jackson writes for the Court: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag . . . is a short cut from mind to mind"⁵⁸ Note what's going on in these lines. Visual images are double edged; they are both "primitive but effective."⁵⁹ When Justice Jackson says that an image works as a "short cut from mind to mind," he portrays images as forceful, but crude.⁶⁰ They're a cheat, a short cut.

Furthermore, there is a certain treachery to images. The Court's opinion reveals a nagging uncertainty about how to account for the flag's meaning. Consider what Justice Jackson says next: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."⁶¹ This passage portrays visual symbols as a potentially hazardous form of communication. If the meaning of a visual symbol rests in the mind of the person who sees it, then a speaker who uses a symbol to convey a message runs a risk that the

⁵³ See *id.* at 642.

⁵⁴ See *id.* at 629-30.

⁵⁵ See *id.* at 629.

⁵⁶ See *Barnette*, 319 U.S. at 629 ("Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.'").

⁵⁷ *Id.* at 624.

⁵⁸ *Id.* at 632.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Barnette*, 319 U.S. at 632-33.

symbol will mean something other than what he intended. Thus, alongside the great power of the visual symbol as speech—it is a primitive and effective shortcut—runs the possibility of betrayal or treachery. The visual symbol is so powerful that it may overpower the speaker. He may not be able to control its meaning.

This same ambivalence about the power and the danger of visual images resurfaces in the Court's later flag burning cases. Not much has changed since *Barnette*. Let's turn to the 1989 case of *Texas v. Johnson*.⁶² Here the Court considered the conviction of a man who burned a flag at a political protest held outside the 1984 Republican convention in Texas.⁶³ The Court struck down the defendant's conviction under a Texas statute that prohibited "desecration" of the American flag.⁶⁴

On First Amendment grounds, *Texas v. Johnson* should have been an easy case. The statute at issue fell well within precedents prohibiting content discrimination. But emotionally this case was very difficult for the Court. Both the majority and the dissent in *Johnson* seemed struck by the strange force of the flag as a visual symbol.

The majority in *Johnson* focused on the special multivalent quality of the flag as a visual image. Just as the Court in *Barnette* had discussed the way in which the meaning of a visual image would fluctuate dramatically depending on who was viewing it and what his attitude was, to the *Texas v. Johnson* Court, the special quality of the flag was its capacity to convey multiple meanings. In fact, according to the majority, it was this quality of the flag that explained why the statute at issue was unconstitutional.⁶⁵ The majority reasoned that the problem with the Texas statute was that it said you could use the flag in only one way, to express patriotism.⁶⁶ But to limit the flag in this manner was to cut off precisely what is unique and powerful about the symbol: that numerous meanings inhere within it. The Court held that you can't impoverish the cultural realm by confining the flag to only one meaning when by its nature it is capable of so many different interpretations.⁶⁷ Visual images by their nature cannot be confined. In short, you can't capture the flag.

What is the dissent's response to this? Yes, the majority is right. Yes, the Texas law is an example of content discrimination. Yes, it is even viewpoint discrimination. But this is the *flag*.⁶⁸ And because it's the flag, content discrimination, even viewpoint discrimination, is acceptable. The flag is so important that it should be

⁶² 491 U.S. 397 (1989).

⁶³ See *id.* at 399-400.

⁶⁴ See *id.* at 400 (quoting Texas Penal Code Ann. § 42.09 (1989)).

⁶⁵ See *id.* at 419.

⁶⁶ See *id.* at 418.

⁶⁷ *Johnson*, 491 U.S. at 417 ("To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.").

⁶⁸ *Id.* at 422 (Rehnquist, J., dissenting) ("For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning.").

an exception to all First Amendment principles.

Why? What is it about the flag that should cause us to ignore clear First Amendment precedent? Isn't the flag after all a piece of cloth? Not according to Justice Rehnquist. In his dissent, he writes about the "mystical reverence"⁶⁹ with which people regard the flag, the "uniquely deep awe and respect"⁷⁰ that we hold for it. When Justice Rehnquist says the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas,"⁷¹ it is as if he is saying that the flag is so powerful, so mystical and awe-inspiring that it is no longer an idea, no longer speech.⁷² In fact, Justice Rehnquist attributes a religious quality to the flag. He mocks the majority opinion for telling us that the First Amendment prohibits the government from insisting on one correct meaning for the flag.⁷³ When he says the government has not "established" our feeling for the flag, that 200 years of history have done that, he puts the word "established" in quotes, conjuring up the religious establishment cases.⁷⁴

Remember that the Jehovah's Witnesses in *Barnette* thought about the flag as a graven image.⁷⁵ One danger of a graven image is that it may inspire idolatry. People may worship the image of God rather than God himself.

And speaking of idolatry, there is a strange, wonderfully understandable slippage in Justice Rehnquist's opinion. At the close of his rhetorically stirring argument, he writes that the majority's ruling means that men "must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case."⁷⁶

Do people really die for the flag? Don't people actually die for what it represents? There is a confusion here between the image and reality. This confusion is of course understandable. Let's imagine soldiers on a battlefield in the heat of terror and violence. To them, the sight of the flag may become so fused with what it represents—our side; our country; living vs. dying—that you can see why they might feel that they are indeed fighting for the flag. It is a rich and powerful symbol. But here and at another point where Rehnquist says the flag "embodies" our nation,⁷⁷ I think his slippage between the image and what it stands for reveals something deeper

69 *Id.* at 429.

70 *Id.* at 434.

71 *Id.* at 429.

72 Johnson, 491 U.S. at 432. Rehnquist on the one hand attempts to dismiss the First Amendment value of flag burning, calling it "an inarticulate grunt or roar." *Id.* On the other hand, his opinion revels in his beatific reverence for the flag and thus pays tribute to the power of the image. *See id.*

73 *See id.* at 422.

74 *Id.* at 434.

75 *See Barnette*, 319 U.S. at 629.

76 Johnson, 491 U.S. at 435.

77 *See id.*

about images. They are so strong, such a plain “short cut” to our minds, that they tempt us to conflate representation with reality.

There is an irrationality to Justice Rehnquist’s opinion, as if he is caught in the grip of the symbol himself, as if the emotional, mystical, religious power of a visual image has overwhelmed him and made him take an easy case and struggle with it. It is as if the danger of visual images, their primitive force, has manifested itself in this opinion. For a brief moment, Justice Rehnquist has given way to idolatry.

V. CONCLUSION: RETHINKING THE PLACE OF ART IN THE FIRST AMENDMENT

Perhaps images *are* “primitive” as the Court said in *Barnette*.⁷⁸ There is a magical, talismanic quality to images. Think of voodoo dolls, based on the belief that harming the object can harm the person. Think of the act of hanging someone in effigy. There is something about an image that tempts us to fuse it with what it represents. Of course this is the basis of idolatry: the danger of building an icon to God is that we might become so entranced with the image—its sensual, beautiful, irrational quality—that we end up worshipping the thing itself, forgetting that it is only a representation. The image is so beguiling that we lose all sense. The next step, of course, is iconoclasm, or censorship.⁷⁹

In the flag cases the Court begins to reckon with the power and significance of speech that is irrational, nondiscursive, iconic, emotional, visual. In contrast to those cases and theories that we’ve confronted in which the First Amendment privileges words and the sensible marketplace of ideas that they inhabit, suddenly, in the flag cases, we see that the importance of visual images is within the Court’s grasp.

Visual images are frequently perceived as more powerful and less controllable than verbal speech. They do not fit comfortably within our current notion of a reasoned, rational marketplace of ideas. I suggest that this lack of fit should cause us not to discard images from the protection of the First Amendment, but instead cause us to rethink the cramped First Amendment model that we currently insist on.⁸⁰ Shouldn’t a free speech model offer protection to speech particularly when it is forceful and capable of provoking strong reactions?

These cases could be the start of the Court’s thinking about art more generally, about why it is important and why it is different from words. Yet the peculiar power of images may also explain the Court’s anxiety. The force of visual images so evident in these cases illuminates both why we censor art but, more importantly, why we should protect it.

⁷⁸ *Barnette*, 319 U.S. 624.

⁷⁹ See generally DAVID FREEDBERG, *THE POWER OF IMAGES* (1989).

⁸⁰ One place to start would be to question our assumptions about the current meanings we assign to certain terms that are key for evaluating speech under the marketplace model: terms, for example, such as “idea,” “rationality” and “reason.”

